STATE OF MICHIGAN

COURT OF APPEALS

JAMES GALLAGHER, LAURA GALLAGHER, CHRISTIAN H. KINDSVATTER, and LORI KINDSVATTER,	UNPUBLISHED February 25, 2014
Plaintiffs-Appellees,	
v	No. 311086 Ingham Circuit Court
CITY OF EAST LANSING,	LC No. 10-001540-NZ
Defendant-Appellant.	

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

On February 17, 2010, sanitary sewage backed up into, and damaged, plaintiffs' homes. Defendant-city is the governmental agency with jurisdiction and control over the relevant sewer system. Defendant filed a motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity, asserting that plaintiffs' claim did not fall within the statutory exception to governmental immunity defined in MCL 691.1417(2), a statute enacted "to provide a remedy for damages or physical injuries caused by a sewage disposal system event." *Pohutski v City of Allen Park*, 465 Mich 675, 697; 641 NW2d 219 (2002).[1]

The trial court denied defendant's motion for summary disposition, stating: "So as far as governmental immunity, I am not in a position to rule today. I think there can be additional fact questions that need to be determined. I guess I would deny that portion of the motion without prejudice." We agree with the trial court that there are questions of fact that must be determined before a ruling on whether plaintiffs' claim is barred by governmental immunity. However, "where there are questions of fact necessary to resolve the ultimate issue whether governmental immunity applies . . . the (C)(7) procedure diverges from the (C)(10) procedure." *Dextrom v*

[1] Defendant also moved for summary disposition under MCR 2.116(C)(8), asserting that plaintiffs failed to properly plead the cause of action. At the hearing, the trial court stated that it would permit plaintiffs to amend their pleadings to cure any defects. Defendant has not asserted on appeal that summary disposition should have been granted under (C)(8), instead appealing only the denial under (C)(7).

Wexford Co, 287 Mich App 406, 431; 789 NW2d 211 (2010). "[T]he trial court [is] to hold an evidentiary hearing for the purpose of obtaining such factual development as is necessary to determine whether [defendant is] . . . subject to the [applicable] . . . exception to governmental immunity." *Id*. at 432. Accordingly, we remand this case to the trial court for an evidentiary hearing so that it may make the factual findings necessary to determine whether plaintiffs' claim is subject to the governmental immunity exception of MCL 691.1417.

MCL 691.1417(2) and (3) provide an exception to the general rule that a governmental agency is immune from tort liability when engaged in a governmental function. Subsection (2) provides that a governmental agency is "immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or back up is a sewage disposal system event and the governmental agency is an appropriate governmental agency." Defendant does not appear to dispute that this case involves a "sewage disposal system event," MCL 691.1416(k), or that it is the "appropriate governmental agency," MCL 691.1416(b). It does, however, dispute that plaintiff can satisfy the additional requirements of subsection (3), i.e., what a plaintiff must prove in order to "seek compensation for the property damage or physical injury from a governmental agency[.]" In *Willett v Waterford Charter Twp*, 271 Mich App 38, 49; 718 NW2d 386 (2006), this Court addressed these provisions and held that a plaintiff must fulfill all five elements of MCL 691.1417(3) in order to avoid governmental immunity. The statutory elements are:

> (a) The governmental agency was an appropriate governmental agency.[2]
>
> (b) The sewage disposal system had a defect.
>
> (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
>
> (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury. [MCL 691.1417(3).]

I. DEFECT

Defendant fails to offer any argument that there was not a defect in the sewage system and concedes that, under *Willet*, the sewer obstruction, whatever the precise physical cause, constituted a "defect." However, there is a factual dispute as to exactly what constituted the obstruction, a fact relevant to the determination of the other contested elements.

Plaintiffs live on Bramble Avenue in East Lansing, which is served by a sewer line that comes off Coolidge Drive. After the report of the backup, sewer workers using a video camera

[2] Again, defendant does not appear to dispute the first element.

inspected the sewer line. Their inspection report states that there was a "blockage," described as a "mineral deposit." As far as we can determine from the record, defendant does not dispute that there was a mineral deposit built up inside the sewer pipe, but presents evidence that the pipe was not completely blocked by the deposit and that the complete obstruction occurred only when an 8-inch "plumbers plug" caught on the mineral deposit.[3]

The *Willet* court discussed what the statute meant by "defect," noting that the word is defined by MCL 691.1416(e) as "a construction, design, maintenance, operation, or repair defect." 271 Mich App 49.

> [T]he Legislature has not included a "fault" element in MCL 691.1417(3)(b). The Legislature required only that a plaintiff allege the mere existence of a "defect" in the sewage disposal system according to the plain language of MCL 691.1417(3)(b). Thus, we must apply the plain and unambiguous language of the statute, and because the facts are not in dispute, conclude that the obstruction of the sewer constituted a "defect" . . . . [*Id.* at 52.]

Accordingly, whether the obstruction was caused by the mineral deposit, the plumbers plug or a combination of both, a "defect" existed and, therefore, plaintiffs established the first element.

II. ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE DEFECT

MCL 691.1417(3)(c) requires plaintiffs establish that, "The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect." Defendant maintains that plaintiffs presented no evidence that it knew or should have known about the plug or mineral deposit. Defendant's expert stated that the relevant portions of the sewer line were examined in 2006 and that no defects were found. He stated that the lines would be inspected again in seven to 10 years and that no routine inspections were done unless there was a construction project in the area. He admitted, however, that he was unfamiliar with the industry standards for preventative maintenance. Defendant also presented evidence that there was no record of any plumber's plug of that model ever being introduced into the system by the department or its agents, and so asserted that it must have been placed in the line by a third party.

Plaintiffs offered evidence that the supervisor of the system stated that the mineral deposit had been building up for years. Plaintiffs' expert stated that, in his opinion, the mineral deposit could have been prevented by routine maintenance and/or surveillance. The expert also testified that the plug could only have been introduced and left in the system by defendant or its agents. He reviewed industry standards for sewer maintenance and opined that the defects, i.e., the plug and mineral deposit, existed because defendant failed to adhere to those standards.

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[3] Plaintiff asserts that the photos on which defendant relies were not provided to plaintiff until they were attached as an exhibit to defendant's reply brief in support of its motion for summary disposition and that the photos are not consistent with the copy of the video inspection that was produced to plaintiffs.

As this summary makes clear, in order to determine whether defendant knew or should have known about the defect, there are multiple factual questions to be resolved before determining whether plaintiff satisfied the second element, including the role of the plug, the source of the plug, and the proper maintenance schedule and techniques.

III. REASONABLE STEPS TO REMEDY THE DEFECT

MCL 691.1417(3)(d) requires plaintiffs establish that, "[t]he governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect." Defendant maintains that this element looks only at the steps taken once the "event," i.e., the sewage backup, occurred. Plaintiffs assert that this element takes into consideration preventative maintenance and, had defendant properly maintained the sewer system, the defect would have been prevented or remedied before the "event" ever occurred.

Defendant's argument that our inquiry should focus only on its prompt response once the sewage backup occurred is unpersuasive. "Defect" is defined as "a construction, design, *maintenance*, operation, or repair defect." MCL 691.1416(e) (emphasis added). Plaintiffs' expert testified that, had defendant followed the industry standards for sewer maintenance and inspection, it would have discovered the plug and/or the mineral deposit before the obstruction that caused the sewage backup into plaintiffs' residences occurred. Contrary to defendant's implication, the "defect" at issue was the obstruction, i.e., plug, the mineral deposit, or both, *not* the backup caused by one or both of those alleged defects. Indeed, if defendant's view was adopted, it would seem that the only basis for liability under the statute would be a failure of a governmental agency to act promptly after a plaintiff's property had already been damaged.

Defendant's reliance on *Willet* is also unpersuasive. In that case, we noted that, "The record reflects that [a third party] introduced a large concrete or asphalt block into defendant's sewer line that caused a backup in the sewer system." 271 Mich App at 51. Further, "[t]here [was] no allegation or evidence that defendant in any way created or contributed to the obstruction." *Id*. The opposite is true in this case. Plaintiffs specifically allege that defendant "created the obstruction," claiming that only defendant or its agents could be responsible for the presence of the plug. Defendant countered this allegation by introducing documentary evidence to suggest that neither it nor its agents ever introduced such a plug into the sewer line. This conflicting evidence creates a question of fact as to whether defendant was responsible for the plug. Moreover, plaintiffs also specifically allege that defendant "contributed to the obstruction" by failing to properly maintain and/or inspect the sewer line, actions plaintiffs claim would have alerted defendant to the presence of the plug and/or mineral deposit, one or both of which plaintiffs claim caused the obstruction. See *id*. at 51-52 ("plaintiff did not allege that . . . even a daily maintenance program could have prevented this obstruction"). Defendant's expert claimed that the inspection and maintenance of the sewer line was adequate. Therefore, there is a question of fact as to whether defendant properly maintained and/or inspected the sewer line and the allegations of the *Willet* plaintiff are distinguishable from those made by the instant plaintiff.

Accordingly, we conclude that the conflicting testimony and evidence establishes questions of fact as to whether defendant failed to take reasonable steps toward remedying the defect or defects.

IV. PROXIMATE CAUSE

The final element of MCL 691.1417(3) requires plaintiffs establish that "[t]he defect was a substantial proximate cause of the event and the property damage or physical injury." MCL 691.1417(3)(e). As discussed above, plaintiffs and defendant disagree on what constituted the "defect." Defendant takes the position that only the plug was a "defect" and plaintiffs maintain that it was a combination of the plug and the mineral deposit. Given the testimony of plaintiffs' expert, there is a question of fact as to whether the mineral deposit was a substantial proximate cause of the sewage back up. Moreover, while defendant claims it was not responsible for the plug's presence in the sewer line, it does admit that the plug was a substantial proximate cause of the sewage backup.[4] Thus, both parties agree that a demonstrable defect, whether the mineral deposit, the plug, or a combination of the two, was the proximate cause of the backup. This satisfies the requirement of subsection (3)(e) that "the defect was the substantial cause of the event."

V. CONCLUSION

MCL 691.1417(3) sets out five elements necessary to avoid the application of governmental immunity. Defendant does not dispute the first element, i.e., that it is the appropriate government agency. Nor does it dispute the second element, i.e., that there was a defect in sewer system, as defined in *Willet*. Third, based upon the language of the statute and the defendant's own theory of the case and proofs, the defect, whatever its precise nature was a substantial proximate cause of the event as a matter of law. See *Strozier v Flint Community Sch*, 295 Mich App 82, 91; 811 NW2d 59 (2011) ("exception to governmental immunity would apply regardless of whether the facts are as plaintiff contends or as defendant contends").

However, elements three and four involve multiple questions of fact including what constituted the defect. The trial court, mistakenly concluding that these questions of fact should be determined by the jury, denied the defendant's motion due to the existence of these questions. However, when deciding a motion under MCR 2.116(C)(7), all questions of fact relevant to whether governmental immunity applies must be determined by the trial court as a matter of law. *Dextrom*, 287 Mich App at 430.

[4] Defendant's brief on appeal states that, "but for the introduction of the plumber's plug, the normal flow of the sewer line was not and is not affected."

Therefore, we vacate the trial court's order denying summary disposition and remand for an evidentiary hearing and factual findings from which the court shall determine whether or not defendant is shielded by governmental immunity or instead subject to the exception set forth in MCL 691.1417.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens